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No. 89-118

IN THE

Supreme Court of the United States

October Term, 1989

ALAN R. STONEMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the only fundamental error which warrants the issuance of a writ of error *coram nobis* is where the indictment fails to charge a crime even in circumstances where the petitioner establishes that the jury charge in his case permitted conviction for conduct that was not criminal?

2. Whether a new trial is a remedy available to a petitioner for a writ of error *coram nobis* who establishes that the jury charge in his case permitted conviction for conduct that was not criminal?

3. Whether a court which reviews a petition for writ of error *coram nobis* and finds that the jury charge permitted conviction for conduct that was not criminal may (i) assume the jury's role by examining the evidence to decide what a properly instructed jury would have found or (ii) make essential evidentiary conclusions without benefit of the trial transcript?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Alan R. Stoneman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 13, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, dated March 13, 1989, as amended April 12, 1989, which is reported at 870 F.2d 102, appears in Appendix B. The order of the United States District Court for the Middle District of Pennsylvania, dated March 29, 1988, which is not reported, appears in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1989. A timely petition for rehearing was denied on April 13, 1989. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case concerns the circumstances under which a writ of error *coram nobis* issues. The writ of error *coram nobis* lies under the All Writs Statute, 28 U.S.C. §1651, which provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

In October, 1984, Petitioner, Alan R. Stoneman, and four other individuals, John R. Torquato, Jr., William T. Smith, Judy Ellis and David Herbert ("Defendants"), were charged in a sixteen count indictment with mail fraud in violation of 18 U.S.C. §1341 (Counts 2-7), violations of the Interstate Travel in Aid of Racketeering Act ("Travel Act"), 18 U.S.C. §1952 (Counts 8-16), and conspiracy to commit mail fraud or to violate the Travel Act under 18 U.S.C. §371 (Count 1). The indictment charged that the Defendants conspired to bribe governmental officials of the Commonwealth of Pennsylvania, Allegheny County, Pennsylvania, and the City of Pittsburgh, Pennsylvania in order to obtain Federal Income Contribution Act ("FICA") recovery contracts on a no-bid basis. The indictment also charged that the Defendants conspired to "defraud the citizens of the Commonwaelth of Pennsylvania . . . of the good, true, loyal, faithful, conscientious and honest services of their elected public officials and public employees" in order to obtain the no-bid FICA recovery work. Indictment ¶4(d).

Torquato, Ellis and Herbert all entered guilty pleas, *United States v. Smith*, 789 F.2d 196, 198 (3d Cir. 1986). Stoneman and Smith pled not guilty and were tried between March 26 and June 24, 1985 before a jury sitting in the United States District Court for the Middle District of Pennsylvania. The trial evidence demonstrated that Smith was involved deeply in organizing and directing the alleged bribery scheme, and the jury found him guilty of conspiracy, four counts of mail fraud, and four Travel Act violations. *Id.* at 197. The evidence against Stoneman, on the other hand, was minimal, and, as the Third Circuit stated, "there was no

direct evidence that Stoneman had knowledge of some improper purpose." *Id.* at 207. The jury acquitted Stoneman on all fifteen substantive counts and found him guilty only of conspiracy. The Third Circuit affirmed the conviction, and Stoneman was sentenced to (and served) four months in prison and was fined $10,000.

The jury in Stoneman's case was instructed that it need not find that Stoneman schemed to deprive anyone of a tangible right in order to convict him of conspiracy to commit mail fraud. The District Court instead instructed the jury that a scheme to deprive the citizens of Pennsylvania of an intangible right would be sufficient to find Stoneman guilty:

> The object of the scheme need not be money or any form of tangible property. A scheme to defraud the citizens of a governmental unit of good and faithful services of their employees and elected public officials can come within the meaning of scheme or artifice to defraud as set forth in the mail fraud statute.

Stoneman, 870 F.2d at 106.

Shortly after Stoneman was released from prison, this Court decided *McNally v. United States*, _____ U.S. _____ 107 S.Ct. 2875 (1987), which held that "schemes to defraud . . . [which are] designed to deprive individuals, the people or the government of intangible rights, such as the right to have public officials perform their duties honestly," do not constitute mail fraud for purposes of 18 U.S.C. §1341, 107 S.Ct. at 2880. This Court also held in *McNally* that, unless "the jury was . . . *required* to find that the [target of the scheme has been] defrauded of . . . money or property," a mail fraud conviction will not lie. *Id.* at 2882 (emphasis added).

Since he already had served his sentence, Stoneman attacked his conspiracy conviction collaterally by petitioning the United States District Court for the Middle District of Pennsylvania for a writ of error *coram nobis*. The District Court had jurisdiction to hear the petition under the All Writs Statute, 28 U.S.C. §1651. Stoneman argued in his petition that his conspiracy conviction was invalid under *McNally* because the jury instruction given by the District Court allowed for conviction for conduct that was not criminal, *i.e.*, conduct allegedly aimed at depriving the citizens of Pennsylvania of their intangible right to good government.

The District Court denied Stoneman's petition, and the Third Circuit affirmed, basing its decision on two grounds. First, the Third Circuit reasoned that a *coram nobis* writ can issue only if a petitioner shows "fundamental error." Although it recognized that the jury in Stoneman's case was charged with an instruction which permitted conviction for conduct that was not criminal, the Third Circuit reasoned that Stoneman could not establish fundamental error for purposes of a *coram nobis* petition because one paragraph of the indictment charged him with a crime. *Stoneman*, 870 F.2d at 104-7. Secondly, the Third Circuit assumed *arguendo* that a proper jury instruction had been given and examined the evidence, and determined that a properly instructed jury would have found that Stoneman conspired to deprive the citizens of Pennsylvania of money or property. *Id.* at 106-7. Although the opinion does ot indicate what evidence the Third Circuit examined, it certainly did not examine the transcript of Stoneman's trial because that transcript was not made part of the record on appeal.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Court Of Appeals Conflicts With This Court's Decision In *United States v. Morgan* And With Decisions Of Other Courts Of Appeals.

In *United States v. Morgan*, 346 U.S. 502, 512 (1954), this Court held that the writ of error *coram nobis* is a means of collateral attack designed to remedy miscarriages of justice. The writ is available to correct errors of fact or law for petitioners who have served their sentences and/or paid the fines imposed upon them.[1] *Id.*

Morgan established a three-part test for scrutiny of *coram nobis* petitions. First, a *coram nobis* petitioner must show that "sound reasons exist[ed] for failure to seek appropriate earlier relief" on direct appeal. 346 U.S. at 512. Second, the petitioner must overcome the presumption that the trial "proceedings were correct," *i.e.*, he must show that there existed an error "of the most fundamental character." *Id.* at 512-13. The *Morgan* court found that incompetent waiver of counsel constituted fundamental error. *Id.* at 504. Third, the petitioner must show that his conviction carries continuing penalties, *i.e.*, that "the results of the conviction may persist." *Id.* at 513.

Subsequent to *Morgan*, several courts of appeal have considered *coram nobis* petitions. Generally, these courts have focused on whether the error or irregularity identified by the petitioner was of the requisite "fundamental character."

[1] *Morgan* recognized that the writ of error *coram nobis*, which originated at common law, properly lies under the All Writs Statute, 28 U.S.C. §1651, and was not superceded in criminal cases by enactment of 28 U.S.C. §2255. The writ is available to those persons who are no longer "in custody" and therefore cannot bring a Section 2255 petition. Although the writ is "ancient," 346 U.S. at 506, it is used with some regularity. *See*, Annot. 38 A.L.R. Fed. 617 (1978) and L. Yackle, *Postconviction Remedies* §§35-39.

In *Flippins v. United States*, 747 F.2d 1089 (6th Cir. (1984), the Sixth Circuit held that a petitioner who demonstrates that he received inadequate trial counsel establishes an error of fundamental character for purposes of a *coram nobis* petition. The Ninth Circuit has held that fundamental error is shown when the petitioner introduces newly discovered material evidence concerning his guilt or innocence, *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), or establishes that a guilty plea was secured improperly. *Holloway v. United States*, 393 F.2d 731 (9th Cir. 1968). *See also, United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974) (jury instruction which permits conviction for noncriminal conduct constitutes fundamental error for purposes of *coram nobis*); *DeCecco v. United States*, 485 F.2d 372 (1st Cir. 1973) (denial of Fifth Amendment right against self-incrimination constitutes fundamental error for purposes of *coram nobis*); *Deckard v. United States*, 381 F.2d 77 (8th Cir. 1967) (same); *Waller v. United States*, 432 F.2d 560 (5th Cir. 1970) (denial of Sixth Amendment right to assistance of counsel constitutes fundamental error for purposes of *coram nobis*); *Lujan v. United States*, 424 F.2d 1053 (5th Cir. 1970) (same). *See also*, Annot. 38 A.L.R. Fed. 617 (1978).

In *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, _____ U.S. _____, 57 USLW 3826 (June 19, 1989), a case identical to the instant matter in all material respects, the Fourth Circuit affirmed the issuance of a writ of error *coram nobis*. In *Mandel*, the defendants' mail fraud convictions were secured using a jury instruction which permitted conviction under either a tangible rights *or* an intangible rights theory. *Id.* at 1070. The Fourth Circuit held that, since the jury instruction permitted conviction for conduct that was not criminal, the petitioners had established the necessary fundamental error, and, with

the other parts of the *Morgan* test having been met, the Court ruled that a writ of error *coram nobis* properly issued. *Id.* at 1072-75.

In this proceeding, following the Seventh Circuit's opinion in *United States v. Keane,* 852 F.2d 199 (7th Cir. 1988), *cert. denied,* _____ U.S. _____, 109 S.Ct. 2109 (1989), the Third Circuit redefined "fundamental error" for *coram nobis* purposes. The Court held that "[a fundamental] error *must* go to the *jurisdiction* of the trial court, thus rendering the trial itself invalid." *Stoneman,* 870 F.2d at 106 (emphasis added). Fundamental error, therefore, is established only "if [the petitioner shows that] the indictment failed to allege a crime." *Id.* at 106 n.7. *See also, Keane,* 852 F.2d at 104-5.

Significantly, the Third Circuit recognized that the jury in this case was not required to find that Stoneman conspired to deprive the citizens of Pennsylvania of any tangible property right and, therefore, that it was charged improperly. 870 F.2d at 104, 107. However, unlike the Fourth Circuit in *Mandel,* the Third Circuit, applying its new constrictive definition of fundamental error, refused to order that a *coram nobis* writ issue.[2] Instead, the court reasoned that, since one paragraph in a 39 page indictment charged Stoneman with conspiracy to deprive Pennsylvania of a tangible property right, Stoneman could not establish fundamental error for *coram nobis* purposes because the trial court had jurisdiction and the trial itself was not invalid. *Id.* at 106.

[2] The court below found that Stoneman established the first part of the *Morgan* test, *i.e.,* that he had good reason for not raising the "intangible rights theory" on direct appeal. 870 F.2d 105 n.8. Although the court below did not address whether Stoneman established the third part of the *Morgan* test, Stoneman clearly suffers continuing collateral consequences from his conviction, *i.e.,* his two professional licenses have been suspended and he has been named as a defendant in a civil RICO suit brought by the City of Pittsburgh.

The Third Circuit's decision to limit fundamental error only to circumstances where the indictment fails to charge a crime curtails the availability of the *coram nobis* writ and significantly limits the effectiveness of a remedy which is designed to correct miscarriages of justice when no other relief is available. *See, Morgan,* 346 U.S. at 511. The Third Circuit's decision is a bold departure from this Court's decision in *Morgan* and conflicts with the decisions of the courts of appeals in all circuits save the Seventh Circuit.[3] Certiorari should be granted to resolve these conflicts and to allow this Court to identify which errors are "fundamental" for purposes of the writ of error *coram nobis.*

2. The Court Of Appeals Departed From The Usual And Accepted Course Of Judicial Proceedings By Improperly Assuming The Jury's Role And Making Essential Evidentiary Conclusions Without The Benefit Of The Trial Transcript.

As an alternative to its holding that no fundamental error occurred, the Third Circuit also "considered whether the evidence presented at trial was sufficient to establish that Stoneman . . . schemed to cause a loss of money to the citizens of Pennsylvania." *Stoneman,* 870 F.2d at 106. In so doing, the Court assumed that a proper jury instruction had been given, examined the evidence and then determined itself whether Stoneman was guilty of conspiracy to commit mail fraud. *Id.* at 104, 106. Based upon its factual finding that Stoneman did scheme to cause a loss of money, and reasoning that a properly instructed jury would have rendered a guilty verdict, the court denied Stoneman *coram nobis* relief. *Id.*

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[3] The Third Circuit's decision also conflicts with *McNally* because the jury in Stoneman's case was not *required* to find that Stoneman conspired to deprive the citizens of Pennsylvania of a tangible property right.

A. The Court Of Appeals Improperly Concluded That A Successful *Coram Nobis* Petitioner Is Not Entitled To A New Trial.

The Third Circuit's decision to examine the evidence was based, in part, on the premise that a successful *coram nobis* petitioner is not entitled to a new trial. *Stoneman*, 870 F.2d 106, 108. The court below reasoned that, since a *coram nobis* petitioner already has served his sentence, the government has no incentive to retry him; therefore, the only relief available to the petitioner is vacation of his conviction. *Id.* The Third Circuit further reasoned that, since no court should vacate a conviction without the most exacting proof, it could examine evidence to ascertain whether the petitioner was convicted wrongfully. *Id.*

The Third Circuit's holding that a successful *coram nobis* petitioner is never entitled to a new trial raises an important question of law and conflicts with decisions of this Court and of several courts of appeals. In *Morgan*, this Court contemplated the possibility of the "continuation of litigation" once a writ of error *coram nobis* issues, 346 U.S. at 511. Similarly, in *Flippins*, 747 F.2d at 1092, and *Holloway*, 393 F.2d at 732-3, rather than grant or deny issuance of a *coram nobis* writ, an evidentiary hearing was ordered so that the validity of the petition could be determined. By granting certiorari, this Court could resolve the conflict among the circuits and address this important procedural issue by determining what kinds of relief are available to *coram nobis* petitioners.

B. The Court Of Appeals Improperly Usurped The Jury's Role As Factfinder And Made Essential Evidentiary Conclusions Without The Benefit Of The Trial Transcript.

By examining the trial evidence, the court below usurped the jury's role as factfinder. In *Mandel*, the Fourth Circuit declined to make factual determinations in light of an improper mail fraud instruction, stating:

> In essence, the government asks this court to review the evidence and decide what a jury would or might have found if the instructions had been proper, or, to put it more bluntly, it asks us to convict the defendants of crimes with which they were not charged. This, we decline to do. The sufficiency of the evidence in a case is a question in each instance to be submitted to a jury, subject only to being set aside for insufficiency. *United States v. Caudle*, 758 F.2d 994, 997 (4th Cir. 1985).

862 F.2d at 1067.[4] A conflict, therefore, exists between the Third and Fourth Circuits as to whether a court may examine the trial evidence and make factual determinations in deciding *coram nobis* petitions.

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[4] *See also*, Judge Aldsert's dissent in *United States v. Piccolo*, 835 F.2d 517, 522 (3d Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 2014 (1988), where the defendant challenged his mail fraud conviction based on the fact that the jury was not required to find a deprivation of tangible rights: "The appellant may be guilty of the crime of mail fraud. But that is not my task to decide . . . my job is to insure that society obeys its own rules." Similarly, in *United States v. Ochs*, 842 F.2d 515, 525 (1st Cir. 1988), a case where the defendant had been convicted of mail fraud under an intangible rights instruction, the First Circuit stated:

> we are unwilling to engage in speculation about whether, despite the instruction, the jury actually found some financial harm. Even if the government is right that, as a logical matter, the jury *should* have found some form of financial harm in order to convict, we believe that the court's instruction—saying exactly the contrary—would have so confused the jury's deliberations on the financial harm issue as to render the conviction invalid.

Additionally, the Third Circuit made factual findings about Stoneman's guilt or innocence without benefit of the trial transcript. Neither Stoneman nor the government made the trial transcript part of the record on appeal. In drawing its conclusion that Stoneman undoubtedly was guilty, the court below relied on the opinion it issued following Stoneman's direct appeal, *United States v. Smith*, 789 F.2d 196. *See, Stoneman*, 870 F.2d at 107. In that opinion, however, the Third Circuit stated: "there was no direct evidence that Stoneman had knowledge of some improper purpose . . . . [The jury's] finding . . . [of] guilt [was] based on circumstantial evidence and credibility." *Id.* at 207. Therefore, not only did the Third Circuit make factual findings without benefit of a trial transcript, it also rendered decisions about witness credibility without seeing or hearing any witnesses.

The Court of Appeal's decision to examine trial evidence without benefit of a trial transcript departs from the accepted and usual course of judicial proceedings and was based on reasoning which conflicts with decisions both of this Court and of several courts of appeals. This Court should grant certiorari to exercise its supervisory powers granted under Supreme Court Rule 171.1(a) and to resolve this conflict.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit. By granting the writ, this Court could explain (a) what constitutes fundamental error for *coram nobis* purposes, (b) what relief is available to a successful *coram nobis* petitioner, *i.e.*, explain whether a successful petitioner is ever entitled to a new trial, and, (c) whether a court reviewing a *coram nobis* petition may examine the evidence and draw factual conclusions without the benefit of the trial transcript.

Respectfully submitted,

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Dated: July 11, 1989

Appendix A—Order, United States District Court for the Middle District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED
Williamsport, Pa.
MAR 29 1988
DONALD R. BERRY, Clerk
PER lp, Deputy Clerk

Criminal No. 84-000156-5

(Judge Muir)

UNITED STATES OF AMERICA,

vs.

ALAN R. STONEMAN.

ORDER

March 29, 1988

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Currently pending before this Court is the petition of Alan R. Stoneman for writ of error *coram nobis*. On June 24, 1985, Stoneman was found guilty by a jury of one count of conspiracy to commit mail fraud and interstate transportation in aid of racketeering in violation of 18 U.S.C. §371. The conspiracy charged that Stoneman and his co-conspirators sought to obtain Federal Insurance

Contribution Act (FICA) recovery contracts from state and local entities on a no-bid basis by bribing public officials with cash, employment, campaign contributions, paid travel, stock, and property. Indictment, Count 1, ¶3.

On July 5, 1985, this Court sentenced Stoneman to a four-month prison term and a $10,000 fine. Stoneman's conviction was affirmed by the Court of Appeals for the Third Circuit on April 28, 1986. United States vs. Smith, 789 F.2d 196 (3d Cir. 1986). The United States Supreme Court denied Stoneman's petition for writ of certiorari on December 15, 1986. United States vs. Stoneman, _____ U.S. _____, _____, 107 S.Ct. 668-669 (1985). His conviction became final on that date. *See* Griffith vs. Kentucky, _____ U.S. _____, _____ 107 S.Ct. 708, 712 n. 6 (1987). Stoneman has fully served the sentence imposed by this Court. The common law writ of error *coram nobis* permits him to challenge the validity of his conviction at this stage of the case. United States vs. Morgan, 346 U.S. 502 (1954).

Stoneman in his petition seeks to attack collaterally his conviction on the basis of the decision of the United States Supreme Court in McNally vs. United States, _____ U.S. _____ 107 S.Ct. 2875 (1987), which he claims invalidates his conviction. In *McNally* the United States Supreme Court held that the federal mail fraud statute, 18 U.S.C. §1341, is limited in scope to the protection of money or tangible property and does not extend to schemes to defraud citizens of their intangible right to honest and impartial government. *McNally*, _____ U.S. at _____, 107 S.Ct. at 2879. The Supreme Court reversed McNally's mail fraud conviction because the District Court's instructions permitted the jury to convict McNally for conduct which deprived the citizens of Kentucky of their intangible right to have the

Commonwealth's governmental affairs performed honestly. Such conduct, the Court held, was not within the reach of the federal mail fraud statute, 18 U.S.C. §1341.

Stoneman asserts that this Court's charge to the jury similarly permitted the jury to convict him of conspiracy to commit mail fraud and interstate transportation in aid of racketeering for conduct not within the reach of the mail fraud statute: depriving the citizens of the Commonwealth of Pennsylvania of their intangible right to good and faithful service by their elected officials. This Court's instruction to the jury defining a scheme or artifice which Stoneman now contends entitles him to a vacation of his sentence was as follows:

> The words "scheme" and "artifice" as used in the statute ... include any plan or course of action intended to deceive other people and to obtain by false or fraudulent pretenses, representations, or promises, money, or property from persons so deceived.
>
> The object of the scheme need not be money or any form of tangible property. A scheme to defraud the citizens of a governmental unit of good and faithful services of their employees and elected public officials can come within the meaning of scheme or artifice to defraud as set forth in the mail fraud statute.

Transcript, June 13, 1985, page 158. This charge was based on the decisions of all of the many Courts of Appeal which had considered the question and as to which there were no contrary appellate decisions.

By order of December 14, 1987, this Court denied the motion of Stoneman's co-defendant, William T. Smith, Jr., to vacate, set aside, or correct sentence pursuant to

28 U.S.C. §2255. United States vs. Smith, 675 F.Supp. 978 (M.D. Pa. 1987). It was our view that *McNally* did not apply retroactively to Smith's conviction because his conviction was final prior to the announcement of the Supreme Court's decision in *McNally* and because he failed to raise the "intangible rights" issue decided in *McNally* in this Court or in his direct appeals. It is our view that *McNally* does not apply retroactively to Stoneman's petition for a writ of error *coram nobis* for the same reasons set forth in our order of December 14, 1987, denying Smith's motion to vacate, set aside, or correct sentence.

In its decision affirming this Court's denial of Smith's motion for bail pending the determination of his petition for writ of habeas corpus, the Court of Appeals for the Third Circuit explicitly refrained from commenting on the merits of the petition for writ of habeas corpus; however, it stated that in ruling on the merits of Smith's petition, we would "undoubtedly find guidance . . . from [the] Court of Appeals] most recent analysis of *McNally* . . . . [in] United States vs. Piccolo." United States vs. Smith, 835 F.2d 1048, 1051 (3d Cir. 1987). However, we had ruled on the merits of Smith's petition before the Court of Appeals decided United States vs. Piccolo, 835 F.2d 517 (3d Cir. 1987) and before the Court of Appeals ruled on Smith's appeal of our denial of his motion for bail pending disposition of his petition for habeas corpus. In *Piccolo,* the Court of Appeals affirmed on direct appeal a mail fraud and conspiracy conviction where the jury had been expressly instructed on the "intangible rights" theory. The Court reached its decision to affirm after reviewing the "totality of the instructions" to determine whether the jury could have convicted the Defendant without finding that an object of the scheme to defraud was to obtain money or property. Unlike the Defendant in *Piccolo,* Stoneman did not raise the *McNally* "intangible rights" theory on direct appeal;

instead, he first raised it in this collateral proceeding after his conviction became final. For that reason, it is our view that consideration of the "totality of the instructions" analysis set forth in *Piccolo* is unnecessary in this case.

Nevertheless, we have reviewed the instructions to the jury given in Stoneman's case and are of the view that they would not require a reversal of Stoneman's conviction under *McNally* and *Piccolo*. The jury was instructed that before it could convict the Defendants of conspiracy it had to determine whether the Government had proved that there existed a conspiracy and scheme to defraud, as alleged and described in the indictment. Transcript of June 13, 1985, pp. 145, 146, 153-154. The indictment which was sent out with the jury charged that it was part of the conspiracy that:

> The Defendants would obtain lucrative contracts from state and local government without competitive bidding, notwithstanding the fact that others were willing to perform substantially identical FICA recovery work at a much lower cost.

Indictment, ¶3(h). Further, ¶4(f) of the indictment charged that one of the objects of the conspiracy was:

> To defraud the citizens of the Commonwealth of Pennsylvania, and other states where the Defendants did business, of the tangible monetary savings and financial benefit flowing from the [intangible] rights [of the citizens to the faithful and honest services of their public officials.]

As we stated in our order denying William T. Smith, Jr.'s petition for writ of habeas corpus,

> A fair reading of the indictment shows that the heart of the scheme or artifice to defraud was to influence through bribery the awarding of a no-bid contract at an inflated price to the monetary

> prejudice of the Commonwealth of Pennsylvania and the school districts who would pay inflated commissions under the contract let by the Treasurer of Pennsylvania.

United States vs. Smith, 675 F.Supp. 978, 981 (M.D. Pa. 1987). The jury was also repeatedly instructed that the conspiracy charge involved a scheme or plan corruptly to influence officials by bribery and that the Government had to prove that the Defendants had the specific intent corruptly to influence such officials by bribery. *See* Transcript of June 13, 1985, pp. 153-169. Moreover, the evidence at trial clearly established that the no-bid contract secured by the Defendants because of the bribes would have cost the Commonwealth of Pennsylvania $6,000,000, that the same contract could have been performed in-house for $300,000 and that the accounting firm of Leventhal and Horwath offered to perform the contract for $1,300,000. *See* United States vs. Smith, 789 F.2d 196, 199 (3d Cir. 1986); United States vs. Smith, 675 F.Supp. 978, 981-982 (M.D. Pa. 1987).

Based upon the evidence and the jury instructions requiring it to find a scheme to influence through bribery the awarding of a no-bid contract, it is our view that the jury could not have convicted Stoneman of conspiracy to commit mail fraud without finding that an object of the scheme to defraud was to deprive the citizens of Pennsylvania of money. We will deny Stoneman's petition for writ of error *coram nobis*.

NOW, THEREFORE, IT IS ORDERED THAT:

Stoneman's petition for a writ of error *coram nobis* is denied.

M. MUIR
Muir, U.S. District Judge

MM:tb

Appendix B—Opinion, Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5294

UNITED STATES OF AMERICA,

Appellee,

v.

ALAN R. STONEMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(CRIMINAL ACTION NO. 84-00156-05).

Argued: September 15, 1988

BEFORE: BECKER, HUTCHINSON and
SCIRICA, *Circuit Judges*

(Opinion Filed March 13, 1989)

Richard R. Nelson, II, Esquire (Argued), James J. Ross, Esquire, Neil F. Siegel, Esquire, Alder Cohen & Grigsby, P.C., Fifth Floor, 600 Grant Street, Pittsburgh, Pa. 15219, Attorney for Appellant.

James J. West, Esquire, (Argued), U.S. Atty.'s Office, P.O. Box 11754, Harrisburg, Pa. 17108, Attorney for Appellee.

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

I.

Appellant Alan R. Stoneman appeals from the United States District Court for the Middle District of Pennsylvania's order denying his petition for a writ of error *coram nobis*. Stoneman seeks to vacate his conviction for conspiracy under 18 U.S.C.A. §371 (West 1966) to violate the mail fraud statute, 18 U.S.C.A. §1341 (West 1984) and to utilize a facility of interstate commerce in violation of the Interstate Travel in Aid of Racketeering Act (Travel Act), 18 U.S.C.A. §1952 (West 1984), based on the United States Supreme Court's recent decision in *McNally v. United States*, _____ U.S. _____, 107 S.Ct. 2875 (1987). I conclude in Part V that the district court's charge on mail fraud only required the jury to find a loss of intangible rights in order to convict, and therefore, in light of *McNally*, was error. However, a majority of the panel believes that, under the evidence, just as in the companion case of *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988), the loss of money was implicit in the intangible rights scheme. More specifically, the majority is unable to hypothesize a set of circumstances under which the jury could have found Stoneman guilty of depriving the

citizens of the Commonwealth of Pennsylvania of their right to honest government (an impermissible intangible right under *McNally*) without also having found that Stoneman was involved in a scheme the sole purpose of which was to insure that a company known as CTA obtained a no-bid FICA recovery contract at a substantially greater cost to the Commonwealth of Pennsylvania than a contract obtained through traditional competitive bidding. The majority believes that the indictment, evidence and jury charge in this case are essentially the same as *Asher*, and that on the authority of *Asher* the conviction must be affirmed.

II.

Stoneman and others were indicted in October of 1984 by a federal grand jury and charged with conspiracy, 18 U.S.C.A. §371, violations of the Interstate Transportation and Aid of the Racketeering Act, 18 U.S.C.A. §1952(a)(3), and mail fraud, 18 U.S.C.A. §1341. The indictment alleged a scheme to obtain Federal Insurance Contribution Act (FICA) recovery contracts from state and local entities by bribing public officials.[1] Stoneman and co-defendant William T. Smith, Jr. pled not guilty and were tried before a jury. After a lengthy trial, the jury found Smith guilty of conspiracy, four counts of mail fraud and four counts of utilizing a facility of interstate commerce in aid of racketeering. The jury convicted Stoneman only of conspiracy. Both defendants were sentenced to prison terms and fined.

Smith and Stoneman appealed their convictions on numerous grounds. They did not, however, argue that the indictment or jury instructions relied on an

[1] A more extensive discussion of the facts is contained in our opinion affirming Stoneman's conviction on direct appeal. *United States v. Smith*, 789 F.2d 196 (3d Cir. 1986).

intangible rights theory and were therefore invalid under the mail fraud statute. We affirmed their convictions in *United States v. Smith*, 789 F.2d 196 (3d Cir. 1986). Both defendants petitioned the Supreme Court for certiorari, which was denied. *Smith v. United States*, 497 U.S. 1017 (1986); *Stoneman v. United States*, 479 U.S. 1017 (1986). After an unsuccessful motion before the district court for a new trial based on newly discovered evidence, Stoneman served his four month prison sentence and paid his $10,000 fine.

On June 24, 1987, the Supreme Court held in *McNally* that the mail fraud statute did not encompass a scheme to defraud which deprived the victims of their intangible right to good and honest government.[2] In November of 1987 Stoneman petitioned the district court for a writ of error *coram nobis* to vacate his conviction based on *McNally*. The district court denied Stoneman's petition, concluding that *McNally* did not apply to collateral attacks on final decisions.[3] In the alternative, the district court reviewed the indictment, the evidence introduced at trial and the jury instructions and concluded that the conviction was valid under *McNally* and our application of *McNally* in *United States v. Piccolo*, 835 F.2d 517 (3d Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 2014 (1988). Stoneman now appeals.

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[2] On October 21, 1988, Congress amended the definition of "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services," thereby overturning *McNally* legislatively. Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690, §7603, 134 Cong.Rec. H11207 (daily ed. Oct. 21, 1988) (approved by the President on Nov. 18, 1988) (to be codified at 18 U.S.C. §1346).

[3] The district court relied on its earlier decision in *United States v. Smith*, 675 F.Supp. 978 (M.D. Pa. 1987) in which it held that *McNally* did not apply retroactively to a petition for a writ of *habeas corpus* under 28 U.S.C.A. §2255 (West 1971).

III.

The question before us is not whether *McNally* is retroactive. This Court recently held that *McNally* applies on a collateral attack of a final conviction in *United States v. Osser*, No. 87-1635 (3d Cir. December 29, 1988).[4] As in *Osser*, the question here is whether an error in jury instructions under *McNally* is a *fundamental* error justifying vacation of a final conviction on collateral review by issuance of a writ of error *coram nobis*.[5]

Those substantive errors which result in a person's charge and conviction for something not a crime are fundamental. In determining what is not a crime, authoritative Supreme Court cases are as much a part of the law as the statute itself. Hence, when the Supreme Court decided in *McNally* that the statute punished only persons who caused tangible loss to victims, that requirement became a part of the definition of the crime. A person charged in an indictment that did not include a loss of tangible rights or convicted by evidence that did not show a violation is punished for something not a crime and is entitled to collateral review. If a defendant were convicted and punished "for an act that the law does not make criminal[, t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief." *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (in *habeas corpus* proceeding, petitioner may assert change in the substantive law after his conviction).

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[4]The government conceded in its brief that *McNally* applied retroactively.

[5] *Osser* held in part that a writ of error *coram nobis* was not available because the appellant waived the issue by not raising it on direct appeal. Osser's appeal was taken in 1972, well before the issue was resolved. *See United States v. Boffa*, 688 F.2d 919, 926 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983). Such an argument is not available to the government here.

IV.

The writ of error *coram nobis* is available to federal courts in criminal matters under the All Writs Act, 28 U.S.C.A. §1651(a) (West 1966).[6] *United States v. Morgan*, 346 U.S. 502 (1954). It is used to attack allegedly invalid convictions which have continuing consequences, when the petitioner has served his sentence and is no longer "in custody" for purposes of 28 U.S.C.A. §2255. The petitioner must show that he is suffering from continuing consequences of the allegedly invalid conviction. *Id.* at 512-13.

Use of the writ is appropriate to correct errors for which there was no remedy available at the time of trial and where "sound reasons" exist for failing to seek relief earlier. *Id.* at 512. "Only where there are errors of fact of 'the most fundamental kind, that is, such as to render the proceeding itself irregular and invalid', [sic] can redress be had." *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)). The error must go to the jurisdiction of the trial court, thus rendering the trial itself invalid. An error which could be remedied by a new trial, such as an error in jury instructions, does not normally come within the writ. *See Mayer*, 235 U.S. at 69; *United States v. Gross*, 614 F.2d 365, 368 (3d Cir.) (per curiam) (conduct of deputy marshal, who annoyed several jurors and expressed romantic interest in particular juror, insufficient to warrant issuance of writ), *cert. denied*, 447 U.S. 925 (1980). Earlier proceedings are presumptively correct and the petitioner bears the burden to show otherwise. *Cariola*, 323 F.2d at 184.

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[6] Federal Rule of Civil Procedure 60(b) abolished the writ of *coram nobis* in civil cases.

Coram nobis is an extraordinary remedy, and a court's jurisdiction to grant relief is of limited scope. *Cariola*, 323 F.2d at 184. "The interest in finality of judgments dictates that the standard for a successful collateral attack on a conviction be more stringent than the standard applicable on a direct appeal." *Gross*, 614 F.2d at 368. It is even more stringent than that on a petitioner seeking *habeas corpus* relief under §2255. *See Osser*, slip op. at 10-11; *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968) (unlike *habeas*, where part of sentence remained unserved, no opportunity or incentive in *coram nobis* setting to retry defendant using newly discovered evidence where sentence already served).

Here, the indictment alleges and the evidence introduced by the government shows that Stoneman schemed to defraud the Commonwealth of Pennsylvania by securing no-bid FICA contracts through the bribery of public officials and did, in fact, cause a money loss to the Commonwealth through such a scheme.

The indictment against Stoneman charges a valid 18 U.S.C.A. §1341 offense under *McNally*.[7] Count I alleges:

> 3. It was part of said conspiracy and scheme or artifice to defraud and use the facilities of interstate commerce to promote, manage, establish, carry on and facilitate bribery that: . . . (h) The defendants would obtain lucrative contracts from state and local government without competitive bidding, notwithstanding the fact that others were willing to perform substantially identical FICA recovery work at a much lower cost.

[7] If the indictment failed to allege a crime, then the district court would have been without jurisdiction to enter judgment against the defendant.

Appendix (App.) at 33, 37-38. Count I also alleges that one of the objects of the conspiracy was "to defraud the citizens of the Commonwealth of Pennsylvania, and other states where the defendants did business, of the tangible monetary savings and financial benefits" by corruptly influencing various elected public officials. *Id.* at 39. Although the indictment also alleges a scheme to defraud the citizens of Pennsylvania of their intangible rights to good and honest government, the quoted passages are sufficient to allege a scheme designed to defraud the citizens of money, a violation of Section 1341 under *McNally*. Stoneman has failed to show that the earlier proceedings were "irregular and invalid," in that the district court had no jurisdiction to try him for the alleged crimes.

We have also considered whether the evidence presented at trial was sufficient to establish that Stoneman and his co-defendants schemed to cause a loss of money to the citizens of Pennsylvania. We agree with the district court that it was sufficient to show that the defendants schemed to cause such a loss. As we discussed in affirming Stoneman's conviction on direct appeal, his company, CTA, Ltd. (CTA) fraudulently obtained a FICA recovery contract for Pittsburgh employees at a cost of $150,000, even though another contractor had bid $35,000. *Smith*, 789 F.2d at 199. The defendants also fraudulently tried to obtain a FICA recovery contract for Pennsylvania state employees at a cost to the Commonwealth of $8,000,000. Evidence showed that the contract could have been performed in-house for $300,000 and that an accounting firm eventually performed it for no more than $1,300,000. *Id.*

V.

Stoneman argues that the jury was instructed that it need not find any tangible property loss to convict the defendants of mail fraud or conspiracy to commit mail fraud and that this instruction was fundamental error entitling him to a vacation of his sentence by issuance of a writ of error *coram nobis*.[8]

After reviewing the jury instructions in their entirety, I believe that the district court erred, under *McNally*, in instructing the jury that it could convict Stoneman of mail fraud solely on an intangible rights theory. The court charged:

> The object of the scheme need not be money or any form of tangible property. A scheme to defraud the citizens of a governmental unit of the good and faithful services of their employees and elected public officials can come within the meaning of scheme or artifice to defraud as set forth in the mail fraud statute.

App. at 187. The mail fraud objective was alleged to be "a scheme to defraud the citizens of the Commonwealth of Pennsylvania of the faithful services of elected public officials and public employees by corruptly influencing them by bribery." *Id.* at 224. The jury was not instructed that it had to find a scheme designed to cause a tangible money or property loss to the Commonwealth of Pennsylvania in order to convict the defendants. The district court also failed to specifically refer to the money losses to the Commonwealth or state counties caused by CTA's procurement of a no-bid contract.

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[8] Stoneman argues that his entire conviction must be vacated, even though he was also convicted of conspiring to violate the Travel Act. Because we conclude that Stoneman's conviction is valid under *McNally*, we need not address this argument.

I believe these jury instructions distinguish this case from those given in *United States v. Piccolo*, 835 F.2d 517 (3d Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 2014 (1988), and *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988). In *Piccolo*, the jury was instructed that it must find that the government proved that the defendant schemed to defraud the victims of both their intangible " 'right to the honest, faithful and loyal services of its employees . . . *and further to defraud* [the victims] *of money.*' " *Piccolo*, 835 F.2d at 520 (emphasis in original). Likewise, in *Asher*, which involved the same underlying scheme to defraud the Commonwealth of Pennsylvania as in the present case, the jury instructions made reference to both tangible and intangible losses to the state. *Id.* at 1494, 1495. In *Asher*, the district court charged the jury that it may find an intent on the part of the defendants to defraud "if it finds that the defendants sought 'to deceive for the purpose of either causing some financial loss to another, or losses of an intangible nature, or bringing about financial gain to one's self, or for any of these purposes.' " *Id.* at 1495. In describing the objects of the conspiracy to defraud, the court instructed that " '[o]ne object involves a statutory right, and one object involves a property right.' " *Id.* In conclusion, the *Asher* court instructed that:

> "Where the statutory duty of refraining from bribery is concerned, or if you find that one of the objects of the conspiracy was *to defraud of the tangible savings coming from an impartially awarded contract*, you do not have to consider the public official defendant first, but may consider both defendants and find either one or the other, or both, either guilty or innocent, as the facts indicate."

Id. (quoting from Appendix at 1540-41) (emphasis in original). Because we were "unable to hypothesize a set of circumstances under which this jury could have found Asher guilty of depriving the citizens of the Commonwealth" of Pennsylvania of their intangible rights without also finding a loss of money due to the obtaining of no-bid contracts, *id.*, we found that these "either/or" instructions satisfied the precepts of *McNally*.[9]

The instructions in our case seem to me closer to those reviewed in *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988). In *Zauber*, the jury was instructed that a defendant need not "realize any gain from the scheme [to defraud], nor that the intended victim suffered any loss. . . . I hereby charge you that it is *absolutely irrelevant* whether or not there was any loss in pension benefits. . . ." *Id.* at 145 (emphasis in original). In *Zauber*, we found that the jury was "clearly instructed solely on an intangible rights theory." *Id.* Since the indictment also failed to charge a money or property loss to the victim, we dismissed those counts of the indictment charging mail and wire fraud violations.

An error in jury instructions is normally remedied by the grant of a new trial. Such a remedy is not appropriate for *coram nobis*, since Stoneman has already served his sentence and seeks only to have its collateral effects alleviated. The United States Court of Appeals for the Seventh Circuit has stated that "[a]n error in the jury instructions—when a valid conviction could have

[9] *Asher* seems to me to broaden *Piccolo's* interpretation of *McNally*. While I believe the instructions in this case are sufficiently different to distinguish those given in *Asher*, I nevertheless feel bound by that opinion to reach the conclusion that a loss of money to the Commonwealth was sufficiently established to uphold this conviction against collateral attack.

been had under different instructions . . .—is not the sort of fundamental defect that produces a complete miscarriage of justice." *United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988).

The indictment against Stoneman charged and the evidence the jury heard established an offense within the meaning of §1341, as interpreted by the Supreme Court in *McNally*. Stoneman did not suffer a conviction for conduct that was not criminal. Accordingly, I believe he failed to meet the burden imposed on him in a *coram nobis* proceeding of overcoming the presumption that his conviction was valid. It is not enough for him to show that it *may* have been invalid. This conclusion, I believe, properly balances the tension between principles of finality and the law's ideal of seeing that no man is improperly convicted. It also serves to distinguish the type of review available on direct appeal from the less searching examination into trial error available on collateral review through the more limited remedy of *coram nobis*.[10] Finally, it is not inconsistent with cases on direct appeal holding it is error to instruct a jury that a mail fraud conviction under §1341 can be based solely on a victim's loss of intangible rights. *See, e.g., Zauber*, 857 F.2d at 145.

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[10] For example, *see Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980) (on direct appeal, Court could not affirm criminal conviction on basis of theory not presented to jury); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976) (new trial required where jury instructed on alternate theories, only one of which sufficient to justify conviction); *but see Asher*, 854 F.2d at 1495 (although jury instructed on alternate theories, one of which invalid under *McNally*, conviction remained valid because loss of money implicit in intangible rights scheme).

VI.

In short, we hold that *McNally* is retroactive, that Stoneman has not shown fundamental error and that he has not overcome the presumption that he was properly convicted of mail fraud, a showing essential to the issuance of a writ of *coram nobis*.

Therefore we will affirm the district court's order denying Stoneman's petition for a writ of error *coram nobis*.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5294

UNITED STATES OF AMERICA,

Appellee,

v.

ALAN R. STONEMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(CRIMINAL ACTION NO. 84-00156-05).

Argued: September 15, 1988

BEFORE: BECKER, HUTCHINSON and SCIRICA, *Circuit Judges.*

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed March 13, 1989, be amended as follows:

Page 1, add an asterisk to denote a footnote following the heading "OPINION OF THE COURT." The footnote shall read as follows:

* Judges Becker and Scirica join Parts I-IV and Part VI of this opinion and with respect to them it constitutes the Opinion of the Court. Part V only expresses the views of the opinion writer.

BY THE COURT:

/s/ WILLIAM D. HUTCHINSON
Circuit Judge

DATED: April 12, 1989

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

Appendix C—Order on Petition for Rehearing, Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5294

UNITED STATES OF AMERICA,

Appellee,

v.

ALAN R. STONEMAN,

Appellant.

(Criminal Action No. 84-00156-05).

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of

the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WILLIAM D. HUTCHINSON
Circuit Judge

DATED: APR 13 1989

Appendix D—Judgment, Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5294

UNITED STATES OF AMERICA,

vs.

ALAN R. STONEMAN,

Appellant.

(D.C. Criminal No. 84-00156-05).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA—SCRANTON.

Present: BECKER, HUTCHINSON and SCIRICA, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 15, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 29, 1988, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS
Clerk

March 13, 1989

Certified as a true copy and issued in lieu of a formal mandate on April 21, 1989.

Test: M. ELIZABETH FERGUSON
Chief Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit

Supreme Court, U.S.
FILED
SEP 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-118 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALAN R. STONEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
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Washington, D.C. 20530
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QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his conviction for conspiracy to commit mail fraud because the jury instructions were erroneous under *McNally* v. *United States*, 483 U.S. 350 (1987), even though the indictment stated an offense and the evidence at trial was sufficient to support the conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-118

ALAN R. STONEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-21a) is reported at 870 F.2d 102. The opinion of the district court (Pet. App. 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1989. A petition for rehearing was denied on April 13, 1989 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on July 11,

1989.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner was convicted of conspiracy to commit mail fraud (18 U.S.C. 1341) and to violate the Travel Act (18 U.S.C. 1952), in violation of 18 U.S.C. 371. He was sentenced to four months' imprisonment and fined $10,000. The court of appeals affirmed his conviction and this Court denied certiorari. *United States* v. *Smith*, 789 F.2d 196 (3d Cir.), cert. denied, 479 U.S. 1017 (1986). In 1987, after this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not apply to certain schemes involving the deprivation of intangible rights, petitioner applied for a writ of error coram nobis to vacate his conviction. The district court denied the application (Pet. App. 1a-6a). The court of appeals affirmed (Pet. App. 7a-21a).

The evidence at trial, which is summarized in the court of appeals' opinion on direct appeal, showed that petitioner participated in a scheme to bribe gov-

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[1] The petition is untimely because it was not filed within 60 days after the entry of the judgment of the court of appeals, as required by Sup. Ct. R. 20.1 in criminal cases. It is clear that this is a criminal case, rather than a civil case, because petitioner seeks a writ of error coram nobis, and the writ has been abolished in civil cases by Fed. R. Civ. P. 60(b). In *United States* v. *Morgan*, 346 U.S. 502, 505 n.4 (1954), where the Court held that the writ remains available in criminal cases, the Court noted that a motion for a writ of error coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding."

ernment officials so that they would award contracts to a company he formed, CTA, Ltd. Petitioner's company sought contracts to recover overpayments of FICA taxes on behalf of state and local governments and their employees (see 789 F.2d at 198 & n.1). It obtained a contract from Allegheny County, Pennsylvania, because petitioner provided stock worth more than $30,000 and numerous other personal benefits to Allegheny County officials. CTA also obtained a $150,000 contract from the City of Pittsburgh, although another company offered to do the job for $35,000. CTA obtained the contract because petitioner gave more than $6,000 and valuable stock options to the President of the Pittsburgh City Council. CTA performed the contract by hiring the other bidder for $35,000. Petitioner also attempted to obtain a contract from the Commonwealth of Pennsylvania. Petitioner's co-defendant, William Smith, bribed Robert Asher, a Republican Party official, in return for a contract with the Commonwealth that would have generated $4 million in profits. The scheme was discovered, the contract was cancelled, and another company performed the work for $1.3 million. *United States* v. *Smith*, 789 F.2d at 198-199.

The indictment and jury instructions on the conspiracy to commit mail fraud count were predicated on the theory that petitioner had conspired to defraud the citizens of Pennsylvania of both intangible and tangible rights. The scheme allegedly defrauded the citizenry of its intangible right to honest and disinterested services by government officials. The government also contended that petitioner had defrauded the people of tangible savings that would have resulted from impartially awarded contracts. At trial,

petitioner did not object to the government's reliance on the intangible rights theory.

Following this Court's decision in *McNally*, which held that the mail fraud statute does not reach schemes to deprive citizens of the intangible right to honest government, and after petitioner had completed serving his sentence, he filed an application for a writ of error coram nobis to vacate his conviction. The district court denied relief. The court concluded, based on the evidence and the jury instructions, that "the jury could not have convicted [petitioner] of conspiracy to commit mail fraud without finding that an object of the scheme to defraud was to deprive the citizens of Pennsylvania of money." Pet. App. 6a.

The court of appeals affirmed. It concluded that "the indictment alleges and the evidence introduced by the government shows that [petitioner] schemed to defraud the Commonwealth of Pennsylvania by securing no-bid FICA recovery contracts through the bribery of public officials and did, in fact, cause a money loss to the Commonwealth through such a scheme." Pet. App. 13a.

ARGUMENT

Petitioner contends (Pet. 5-9) that this Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits concerning whether coram nobis relief is available to vacate mail fraud convictions that were based in part on an intangible rights theory.

In our brief acquiescing in the certiorari petition in *Keane* v. *United States*, No. 88-1178, and in our petition for a writ of certiorari in *United States* v. *Mandel*, No. 88-1759, we urged the Court to resolve

the conflict on this issue. This Court, however, denied certiorari in both cases. *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989); *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989). Nothing has occurred since the Court denied certiorari in those cases that would make review in this case more appropriate. (The court of appeals' decision in this case was cited in the submissions in *Keane*.)

In any event, petitioner is clearly not entitled to coram nobis relief. In *United States* v. *Morgan*, 346 U.S. 502 (1954), this Court stated that not all errors, but only those " 'of the most fundamental character,' " warrant coram nobis relief. *Id.* at 512 (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)). The defect in the jury instructions here did not amount to fundamental error since petitioner's scheme clearly contemplated a loss to Pennsylvania of property within the meaning of *McNally*. The courts below determined that the indictment, the proof, and the jury instructions focused on monetary loss. As noted by the court of appeals: "[T]he loss of money was implicit in the intangible rights scheme. * * * [The court] is unable to hypothesize a set of circumstances under which the jury could have found [petitioner] guilty of depriving the citizens of the Commonwealth of Pennsylvania of their right to honest government (an impermissible intangible right under *McNally*) without also having found that [petitioner] was involved in a scheme the sole purpose of which was to insure that a company known as CTA obtained a no-bid FICA recovery contract at a substantially greater cost to the Commonwealth of Pennsylvania than a contract obtained through tradi-

tional competitive bidding." Pet. App. 8a-9a. Thus, this case is quite unlike *McNally*, where the Court stressed that Kentucky, the alleged victim of the scheme, had lost no money (483 U.S. at 360).[2]

Moreover, this Court recently denied the petitions of co-conspirators Smith and Asher, each of whom raised *McNally* challenges to their convictions. *United States* v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, 109 S. Ct. 836 (1989); *United States* v. *Smith*, 865 F.2d 253 (3d Cir. 1988) (Table), cert. denied, 109 S. Ct. 1936 (1989). Asher, who was tried separately from Smith and petitioner, raised his *McNally* challenge to his conviction on direct appeal. Smith attacked his conviction on *McNally* grounds by a collateral attack on his conviction under 28 U.S.C. 2255. The court of appeals rejected their contentions, holding in each case, as it did in this case, that their scheme contemplated a loss of money by the victims. Because Asher was not entitled to reversal of his conviction on direct appeal and Smith was not entitled to reversal of his conviction under Section 2255, it follows that petitioner is not entitled to coram nobis relief.[3]

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[2] Other courts of appeals have likewise concluded that kickback schemes usually involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987). That question is of no prospective importance, in any event, in light of the amendment of the mail fraud statute to overturn *McNally*. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508; see 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

[3] Contrary to petitioner's contention (Pet. 11-12), the court of appeals correctly examined the record to determine whether petitioner was prejudiced by the inclusion of in-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tangible rights language in the jury instructions. See generally *United States* v. *Hasting*, 461 U.S. 499, 509-512 (1982). Furthermore, the court properly relied on its decision affirming petitioner's conviction on direct appeal (see Pet. App. 14a) in concluding that petitioner's scheme deprived Pennsylvania of money.

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